

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

RESIDENTIAL CAPITAL, LLC, et al.,
Post-Effective Date Debtors

Chapter 11

RESCAP BORROWER CLAIMS TRUST,
Objector

Case No. 12-12020-mg

v.
TIA DANIELLE SMITH,
Creditor-Beneficiary

PRELIMINARY PRE-TRIAL MEMORANDUM

INTRODUCTION

The facts in support of Ms. Smith's Proofs of Claim are set forth the Declaration of Tia Danielle Smith and Declaration of M. Nawaz Raja, the documents she intends to introduce into evidence as set forth in the Joint Proposed Pre-Trial Order, other publicly recorded documents, judicial admissions, admissions against interest, and judicially noticeable records in other proceedings. The objection to the Objector's standing to pursue the Objection to her Proofs of Claim had been filed as the Second Amended Objection on January 24, 2016 (Doc. 9544) and is incorporated by reference as if fully set forth herein.

ARGUMENT

I. The California Unfair Competition Law (UCL) allows for restitution and disgorgement of profits in private actions for violations of California Business and Professions Code 17200-17210.

California Business and Professions Code sec. 17200 provides:

17200. As used in this chapter, **unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice**

and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code. (Emphasis added.)

California Business and Professions Code sec. 17203 provides:

17203. Injunctive Relief--Court Orders

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, **or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.** Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state. (Emphasis added.)

Restitution is the remedy provided by the UCL for losses of money or property, real or personal, including disgorgement of profits, which may have been acquired by such unfair competition, meaning any unfair, unlawful or fraudulent business act or practice. A misrepresentation made for the purpose of inducing a person to reasonably belief that there is a requirement that mortgage payments be missed in order to apply for a loan modification is an unfair or fraudulent business practice.

In Ms. Smith's case, it will shown that she lost money and property. She made payments to a mortgage servicer which was no longer authorized to service mortgages by its own vertically integrated securitization operation. She was engineered into a default position by the dual misrepresentations of Homecomings Financial, LLC (Homecomings) and GMAC Mortgage,

LLC (GMACM) or the misrepresentation of GMACM alone (if Homecomings was not the servicing agent for the mortgage payments in mid-September, 2007) that she would not be able to apply for a loan modification unless she three (3) months past due in her mortgage payments. She lost money, tangible and intangible property and title to her Homestead which is yet to be restored.

CONCLUSION

Residential Funding Company, LLC (RFC) and RALI profited from the engineered default. GMACM and Homecomings made profits in the form of servicing fees for engineering the Claimant's default. The profits of these RESCAP Debtors from the unfair, unlawful and/or fraudulent business practices must be disgorged and Claimant must receive restitution for her property losses and restoration of the title to her Homestead.

Dated at Madison, Wisconsin this 26th day of January, 2016.

/s/ Wendy Alison Nora

Wendy Alison Nora
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